No. _____

83-6519

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

EDWARD LONZO McCALL,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Petitioner was denied his right under the Sixth and Fourteenth Amendments to the United States Constitution to confront the witnesses against him where certain hearsay statements were admitted in evidence under the co-conspirator exception to the hearsay rule.

II.

Whether the Petitioner was denied his right to a fair trial and due process of law under the Fourteenth Amendment to the United States Constitution where he was forced to go to trial joined with a co-defendant whose defense was so inconsistent with the Petitioner's defense that the defendant had to spend as much time defending himself against counsel for the co-defendant as he did against the prosecution.

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OPINION BELOW

The reported Opinion of the Arizona Supreme Court and a supplemental reported Opinion denying Petitioner's motion for reconsideration in that court are attached as Appendix A and Appendix B respectively.

JURISDICTION

The Opinion of the Arizona Supreme Court affirming Petitioner's conviction and death sentence was rendered on November 9, 1983. The supplemental opinion denying Petitioner's timely motion for reconsideration was filed on February 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States which provides:

> "In all criminal prosecutions, the accused shall enjoy their right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

and the Fourteenth Amendment to the Constitution of the United States which provides, in pertinent part:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On January 7, 1981 a direct complaint was filed in the Superior Court for Maricopa County, Arizona, charging Edward Lonzo McCall with the following felonies:

Count I - the first degree murder of William Patrick Redmond on December 31, 1980

Count II - the first degree murder of Helen Genevieve Phelps on the same date

Count III - attempted murder of Marilyn Ruth Redmond on the same date

Count IV - armed kidnapping of William Redmond on the same date

Count V - armed kidnapping of Helen Phelps on the same date

Count VI - armed kidnapping of Marilyn Redmond on the same date

Count VII - armed robbery of William Redmond on the same date

Count VIII - armed robbery of Helen Phelps on the same date

Count IX - armed robbery of Marilyn Redmond on the same date

Count X - armed robbery of the Redmond residence on the same date

The complaint also contained seven counts relating to a separate incident which were ultimately severed from the first ten counts.

A preliminary hearing was held in the Superior Court on January 14 and January 15, 1981 and the defendant was bound over as charged on all counts.

An information was filed in the Superior Court on January 22, 1981 charging McCall with the same crimes upon the same factual allegations. This became Cause No. CR-116940. McCall was arraigned on these charges on January 26, 1981 and he entered a plea of not guilty.

On June 19, 1981 a totally separate complaint was filed in the Northwest Phoenix (Maricopa County, Arizona) Justice Court charging one Robert Charles Cruz with ten separate felonies. These ten felonies were the exact same felonies that McCall was charged with in the other case. On the same date, a second complaint was filed in the Northwest Phoenix Justice Court charging Cruz with the same ten felonies but adding a charge that he had conspired with McCall to commit the Redmond homicides and McCall was also charged in this added conspiracy count. A preliminary hearing was held on this complaint and on July 8, 1981 both defendants in this case were held to answer on all charges.

On July 13, 1981 an information was filed in the Superior Court for Maricopa County, Arizona charging Cruz and McCall with the same crimes upon the same factual allegations except that now fifteen alleged overt acts were set forth with respect to the conspiracy count. This case became Cause No. CR-120721. At this point, there were two separate cause numbers pending against McCall in the Superior Court as described above. It appears from the record that these two cause numbers were not officially joined together

for trial until September 25, 1981. In the meantime, various motions were filed under the separate cause numbers. On July 23, 1981, in CR-120721, Cruz filed a motion to sever his trial from that of McCall. McCall later joined this motion to sever in writing.

These motions to sever were denied, and on November 4, 1981, in CR-116940, McCall filed a motion for reconsideration of the trial judge's order denying severance of the defendants.

On October 1, 1981 the trial judge, on his own motion, severed Counts XII through XVII in CR-116940 from all other consolidated counts.

On November 9, 1981 a consolidated trial of McCall and Cruz, on all of the charges arising out of the Redmond incident, began before a jury in the Superior Court. The trial continued until December 10, 1981 when the jury returned verdicts finding both defendants guilty of all charges. On January 8, 1982 an aggravation/mitigation hearing was held.

On January 11, 1982 McCall was sentenced as follows:

Count I in CR-120721 - life

Count I in CR-116940 - death

Count II in CR-116940 - death

Count III in CR-116940 - 21 years

Count IV in CR-116940 - 21 years

Count V in CR-116940 - 21 years

Count VI in CR-116940 - 21 years

Count VII in CR-116940 - 21 years

Count VIII in CR-116940 - 21 years

Count IX in CR-116940 - 21 years

Count X in CR-116940 - 21 years

The sentences were imposed in such a manner that the sentence for Count I in CR-120721 for conspiracy to commit first degree murder was to begin on January 4, 1981, the date of the defendant's incarceration. The sentence on Count X in CR-116940 for burglary, first degree, was consecutive to the conspiracy sentence. The sentences on Counts IV, V and VI in CR-116940 for kidnapping were concurrent with one another and consecutive to the burglary sentence in Count X. The sentences on Counts VII, VIII and IX in CR-116940 for armed robbery were concurrent with one another but consecutive to the kidnapping

sentences. And, finally, the sentence on Count III for attempted first degree murder was 21 years to be consecutive to the armed robbery sentences. In summary, McCall was sentenced to die twice, followed by one life sentence, followed by 84 years in prison.

A timely notice of appeal was filed as to all counts in state court on January 12, 1982.

Co-defendant Cruz, who was tried with McCall, was also convicted on all charges and also given the death penalty. He, too, filed a timely notice of appeal.

McCall's appeal was briefed and argued before the Arizona Supreme Court and on November 9, 1983 that court filed an opinion for publication affirming McCall's convictions and his sentences. This opinion is attached hereto as Appendix A. A timely motion for reconsideration was filed with the Arizona Supreme Court. On February 14, 1984 the Arizona Supreme Court filed a supplemental opinion for publication denying the motion for reconsideration.

Co-defendant Cruz' convictions, however, were reversed by the Arizona Supreme Court and he is now awaiting retrial in the Superior Court for Maricopa County.

STATEMENT OF FACTS

William Patrick Redmond spent the best part of his adult life in the printing business working for first one company then another. In the early 1960's, after he had taken up this line of work, he married a lady named Marilyn Phelps. During these years, Redmond met another printer named Ron Lukezic and when one would leave a place where they worked the other would follow so that they almost always worked at the same company. In 1975 they started their own company and called it Graphic Dimensions.

The new business grew rapidly. Starting with one small press, by 1980 they had two full color presses and 25 employees and they grossed over a million dollars a year. They had the capability to do high-quality commercial color printing -- they could do everything from annual reports for Fortune 500 companies to DeGrazia prints.

Individual prosperity flowed from corporate prosperity. By 1977 the Redmonds could afford to live at 320 West El Camino in one of the more

expensive neighborhoods in Phoenix, Arizona. They owned half of a $30,000 boat. They owned a brown van and a gold Cadillac.

Mrs. Redmond's mother was named Helen Genevieve Phelps. She was a lady in her 70's and she lived in Iowa with Marilyn's father. In December of 1980 she decided to come to Apache Junction, Arizona for the wedding anniversary of a friend. Mr. Phelps, being ill, decided not to come. This trip put Mrs. Phelps in a position where she could visit her daughter over the holidays.

On the afternoon of New Year's Eve of 1980, the Redmonds decided to invite some friends over to mark the demise of the old years. They would cook dinner and invite the Kellys and Del Brooks and Bob Gladden and the Keechs. They talked about snacks and chips. They called their friends and planned to eat at 7:30 or 8:00.

Marilyn Redmond and her mother began the dinner preparations and at about 6:30 Pat Redmond came home. There was ham and roast beef in the oven and bread and rolls on the counter. Redmond sat in front of the fireplace and played with the dog. Then there was a knock on the carport door.

Marilyn Redmond and her mother were in the kitchen at this time, so Pat Redmond answered the door. Thinking it was her company at the door, Marilyn went into the bedroom to get her cigarettes and some quarters to play cards with. Then her husband called her to the laundry room and when she got there there was a black man pointing a gun at Pat. Mrs. Phelps was fixing the relish trays. Marilyn told her they were being robbed.

Marilyn was next herded around the house to close the drapes and then returned to the family room where she noticed a second intruder in her home. This man had his hand inside a briefcase. There was a brief interlude while Mrs. Redmond chased the dog, and then the black man ordered her into the bedroom. Marilyn went into the bedroom with the black man, but her husband stayed in the family room with the man with his hand in the briefcase who was saying, "I'll stay here with Mr. Bigshot, old Mr. Bigshot."

In the bedroom, the black man took Marilyn's jewelry. Marilyn then noticed that her mother was there in the room lying on the bed. Then Marilyn noticed another black man in the bedroom, a man she had not noticed before. The intruders continued to scour the house for more jewelry and then

they inquired about weapons and Marilyn showed them a pistol in the nightstand. She told them there were other guns in the hall closet. One of the black men took her to get those guns and she could see her husband still sitting with the third man. They returned to the master bedroom. And when they were there, the third man and her husband came into the bedroom and Pat was made to lie on the bed. Now everyone in the house was in the master bedroom. And Marilyn was made to lie on the bed with her husband and mother. Next, the three victims were bound and gagged.

Mrs. Redmond then heard two shots and that was all she remembered. She must have been unconscious for only a short period of time because when she awoke her guests were not there yet and they were her first thought. She made her way, crawling, into the family room.

Marshall Kelly was the first of the guests to arrive. He knocked and walked in. What he found was Marilyn, ". . .laying (sic) on the floor on her stomach with her hands taped behind her back." He asked what had happened and was told that the Redmonds had been robbed. Marilyn told him that Pat was in the bedroom. And there he found Mrs. Phelps on the bed and Pat Redmond part on the bed and part off and it was apparent to him that both of them were dead. He told his wife to call the paramedics and the police.

It was the government's theory at trial that Edward Lonzo McCall, the Petitioner, and two Chicago hit men were responsible for the events described above, and that it was a killing hired for the most farfetched and implausible of motives. This theory held McCall's co-defendant, Robert Cruz, to be the mastermind of the plot.

It was also Cruz' theory at trial that McCall was the culprit; but for entirely different reasons. Cruz saw Ed McCall as one of a band of inept burglars headed by a man named Arnie Merrill who was the government's main witness. Cruz protested that the Redmond case had come about because Merrill, et al., had botched a simple burglary. Hence, McCall was in the position at trial of having to defend himself against Cruz and the government.

The government's theory begins with a series of relationships that are quite complex. Arnold Merrill, the government's main witness, had

known Artie Ross for 20 years, going back to the time they had lived in New York. Indeed, Ross was married to his cousin. Artie Ross has a sister named Joyce who was married to Ron Lukezic who was Pat Redmond's partner. Merrill met McCall in 1978 and Cruz in 1980. Cruz and Artie Ross were partners in Sunview Development and so Merrill met Cruz through Ross and it would follow that Cruz knew the Lukezic's through Ross. So, from time to time, Merrill would see Cruz at Sunview. They had "a casual relationship".

In September of 1980, Cruz invited Merrill over to his house in Tempe (Arizona) and asked this "casual" friend if he would kill Pat Redmond for him. He showed Merrill a picture of Redmond. He gave him Redmond's address. He told Merrill he would give him $10,000, but Merrill said that this was not his line of work. Cruz then offered him $5,000 just to drive a car and he declined this too.

Later that fall Cruz had Merrill come over to his business called Mel's Italian Ice and this time he announced that not only was he going to have Redmond killed he was going to have Ron Lukezic killed as well so that he could take over their business. He said Redmond was refusing to sell the business.

On December 3, 1980, Cruz called Merrill and told him to come over to his house; he took a tranquilizer and went. Merrill drove Cruz to the airport. There, he drank tomato juice until he saw two black men get off a flight. Merrill got the car then and picked up the other three and they went to Cruz' home. There he was introduced to Bracey and Hooper. Then they went to the Holiday Inn in Scottsdale (Arizona) where the two men from Chicago were staying. Merrill was not invited in and he wound up going home.

The next day, at Cruz' bidding, Merrill played errand boy for the two Chicago killers. He took them to get some guns. He took them to Cruz' place so he could give them some money. He took them shooting. He took them to Western Union. And he took them to a massage parlor. There is no explanation in the record as to why Merrill was doing all this. In any case, when he and Bracey came out of the massage parlor Bracey showed him a piece of paper with Graphic Dimensions written on it. He then drove them there and Bracey said he was looking for a brown van. Then he drove them by the Redmonds'

home. Then, once again, he returned them to the Holiday Inn. The next day was a repeat. Cruz called and Merrill complied. He took them by Graphic Dimensions and the Redmonds' home. He took them to the home of a pair of prostitutes in South Phoenix. That evening the two alleged black Chicago hit men checked out of their motel and moved in with Merrill.

The following evening Merrill, once again, acted as the chauffeur for Bracey and Hooper and he took them to Chesters Lounge, a Phoenix, Arizona bar which Pat Redmond was known to frequent. Here, they located Redmond's car and the, waited. Finally a man came out and started the car and they followed him. They followed the car into the central part of Phoenix until they reached the absolute heart of downtown, whereupon Hooper rolled down the window and started to shoot Pat Redmond. Merrill panicked and he whipped his car around in such a fashion as to prevent the execution at that point. Bracey wanted to chase Redmond up Central Avenue, the main street in Phoenix, but Merrill refused and the evening ended at his house.

On December 30, 1980, Cruz called Merrill and asked him to have McCall pick up a package of guns and to meet Bracey and Hooper at the airport. He called McCall. He rechecked the addresses of Graphic Dimensions and the Redmond house. But, apparently, someone else picked Bracey and Hooper up because they showed up at his house the next morning. They stayed awhile and then went to the South Phoenix prostitutes' home. The next time he saw them was about 6:30 or 7:00 that evening when they walked into his house with McCall, and Hooper said, "We got three".

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRAND CERTIORARI TO RESOLVE THE TENSION BETWEEN THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND TO SETTLE A DISPUTE BETWEEN THE VARIOUS FEDERAL CIRCUIT COURTS ARISING OUT OF THIS TENSION

Mrs. Phelps and Mr. Redmond were murdered on New Year's Eve 1980. The three persons who allegedly entered their house and murdered them were Edward Lonzo McCall, a white former police officer from Phoenix, whose nickname was "Preacher", and Billy Bracey and Murray Hooper, two black

men from Chicago who were allegedly professional killers. Shortly after the beginning of the new year, McCall was arrested in Phoenix, charged with murder, and incarcerated without bond. Bracey and Hooper went about their business in Illinois.

In Chicago, Hooper had a friend named Morris Nellum. During the months of January and February of 1981, Hooper and Nellum apparently spent quite a bit of time together in Chicago doing various things. During these times when they were together, Hooper allegedly made various statements to Nellum about what had taken place in Phoenix. At McCall's trial the prosecution called Nellum as a witness to testify about the various things that Hooper had allegedly said to him in Chicago in January and February of 1981. After preliminary questioning, the prosecutor attempted to get into these statements and defense counsel objected to the admission of these statements on the basis that they were hearsay under Arizona evidentiary law and also that they denied McCall his right to confront Hooper. (RT 127, 11-24-81) Both objections were overruled and Nellum was then allowed to testify as to the various things Hooper had allegedly said to him in Chicago on the theory that they were admissible under the Arizona co-conspirator exception to the hearsay rule because the conspiracy was still ongoing because all of the participants had not been paid.

Nellum was allowed to testify that Hooper called him on New Year's morning in Chicago at about 6:00 or 7:00 and asked Nellum to pick him up. (Id. at 125) Nellum did so and Hooper showed him a ring, a watch and a pistol. (Id. at 126) Over appropriate objection, Nellum was allowed to say that the items had been taken "off some people" at a house in Arizona, (Id. at 128) and that they "had to kill three people". (Id. at 129) He was also allowed to testify that on the same morning Hooper was angry because when he first went to Arizona he was supposed to have to kill only one person and he wound up having to kill three. (Id. at 129)

Nellum also was allowed to testify about a conversation he had with Hooper in Chicago on January 2, 1981. (Id. at 140) Again, over appropriate objection, he said that Hooper told him that he had come out to Arizona and that he was trying to contact the people he had done business with to get his money. (Id. at 141)

And then Nellum was allowed, over appropriate objection, to testify about conversations that took place in Chicago in roughly the second week of January, 1981. (Id. at 142) This took place in a bar and Nellum saw that jewelry he had seen before plus other jewelry and Hooper said he was going to pawn it. (Id. at 143) Bracey showed him a ring and said he got it in Arizona. (Id. at 144)

From two days to a week after this incident, Nellum was at Hooper's Chicago apartment. (Id. at 146) Over appropriate objection, he was allowed to testify that on this occasion Hooper again expressed anger at not having got his money. (Id. at 147)

In another part of January, Hooper called Nellum and asked him to take Hooper downtown. (Id. at 149) Over appropriate objection, he testified that Hooper had gotten a call that he was going to be paid. (Id. at 149) He took Hooper to an office downtown and it was closed and Hooper was mad. (Id. at 150) So Nellum took him back to this office a second time and Hooper explained that he had "gotten a call at a lawyer's office and they were going to give him the rest of his money." (Id. at 152) Hooper said that they had to be there by 5:00 because he was expecting a call. (Id. at 153) Nellum parked and Hooper went in the building. (Id. at 153) When Hooper got back, he said he had got some of his money and he gave Nellum a $50 bill. (Id. at 154) He also said the fat man had called him. (Id. at 155) (Robert Cruz, McCall's co-defendant, is extraordinarily fat as was obvious to the jury)

Finally, in closing his direct examination, Nellum was allowed, over appropriate objection, to go back to his New Year's Day conversation with Hooper and to add that two other people had participated in the "hit" in Arizona with him and Bracey and that one of them was an "ex-policeman". (Id. at 187)

The Arizona Supreme Court, on direct appeal, upheld the trial judge's ruling that all of this testimony was appropriately admitted under the co-conspirator exception to the hearsay rule and that McCall had not been denied his right to confront Hooper.

In Dutton v. Evans, 400 U.S. 74 (1970) this Court faced the question of the proper relationship between the co-conspirator exception to the

hearsay rule and the confrontation clause of the Sixth Amendment to the United States Constitution. Dutton holds that a defendant is not necessarily denied his right to confrontation when testimony is admitted against him under the co-conspirator exception to the hearsay rule. Rather, Dutton seems to say, this issue should be resolved on a case-by-case basis and in the opinion this Court set forth four guidelines that trial courts should use in making the decision whether to admit hearsay testimony under the co-conspirator exception. Those four factors are:

> (a) Whether the statement contains an express assertion about past fact;
>
> (b) Whether the hearsay declarant had personal knowledge of the identity and role of other participants in the crime at hand;
>
> (c) The possibility that the hearsay declarant's statement is founded on faulty recollection;
>
> (d) Whether the circumstances under which the hearsay declaration were made give reason to suppose that the hearsay declarant was misrepresenting the involvement of fellow participants in a crime.

This Court should grant certiorari in this case because this Court's opinion in Dutton v. Evans, supra. has led to a split among the circuits regarding the admissibility of testimony under the co-conspirator exception to the hearsay rule. Some circuits have taken the position that a statement that satisfies the admissibility requirements of Rule 801(d)(2)(E) (the rule is the same in federal courts and in Arizona and bears the same number), per se satisfies the confrontation clause. United States v. Johnson, 575 F.2d 1347, 1362 (5th Cir. 1978); United States v. Papia, 560 F.2d 827, 836 n. 3 (7th Cir. 1977); Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972) cert. den. 409 U.S. 1128 (1973). These circuits appear to have discarded the analysis required by Dutton v. Evans, supra.

Other circuits have adhered to the teaching of Dutton v. Evans, supra. by following the case-by-case analysis suggested therein. Examples are to be found in United States v. Puco, 476 F.2d 1099 (2d Cir. 1972) cert. den. 414 U.S. 844 (1973); United States v. Davis, 578 F.2d 277, 281 (10th Cir. 1978); United States v. Kelley, 426 F.2d 615, 620 (8th Cir. 1975) cert. den. 424 U.S. 971 (1976); United States v. Snow, 521 F.2d 730, 734 (9th Cir. 1975).

This Court should also grant certiorari for the simple purpose of rethinking the principles set forth in Dutton v. Evans, supra. Exceptions to the hearsay rule have always been based upon the theory that certain kinds of out of court statements bear their own intrinsic guarantees of reliability. Dying declarations, for example, have always been thought reliable on the basis that people do not lie when they are dying. In like fashion, this Court's confrontation clause jurisprudence has been based upon the theory that face-to-face confrontation can be eliminated if certain types of statements carry with them their own intrinsic indicia of reliability. Dutton v. Evans, supra. is an example of this line of thinking. The fact of the matter is, however, that there is probably no form of out of court statement which is less reliable than a statement made by a co-conspirator after some conspiracy has ended. As one commentator has put it, "To the extent a conspirator feels safe, he may be motivated to misrepresent the affair to a listener he wishes to impress." Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv.Law Rev., 1378, 1386 (1972).

This case is a perfect example. Here we have Nellum and Hooper riding around the City of Chicago, 1800 miles away from the scene of a murder quite some time after it has been committed. Hooper is angry on each occasion because someone has not paid him some money. Nellum is obviously in a subservient position to Hooper, who he has known since they were teenagers because Hooper had sufficient status in the eyes of Nellum to be able to be able to call him up at 6:00 or 7:00 on New Year's morning and commandeer a ride. Under all of these circumstances, there is absolutely no reason to believe that anything Hooper said to Nellum has any reliability whatsoever. There is no reason to believe that Hooper was doing anything but, in Davenport's words, ". . . misrepresent(ing) the affair to a listener he wishes to impress."

Lastly, even when the analysis of Dutton v. Evans, supra. is applied to the facts of this case, the Petitioner contends that the testimony of Nellum's denied him his right, under the Sixth Amendment, to confront Hooper and was therefore improperly admitted. In the first place, this case was not nearly as strong a case against the defendant as we find in Dutton v.

Evans, supra. In that case, there was at least one reliable eye witness to the murder, i.e., Truett. Here, the only eye witness to the murder was Marilyn Redmond who initially identified Edward Lonzo McCall as a black man. Secondly, the hearsay declaration in Dutton v. Evans, supra. contained no express assertion about past fact, but was more in the nature of a spontaneous exclamation by Williams arising out of his anger. Thirdly, in Dutton v. Evans, supra., this Court found that Williams' personal knowledge of the identity and role of the other participants in that triple murder was abundantly established by the testimony of the eye witness, Truett, and by the fact that Williams had already been convicted of the murder. Here, as has been pointed out, the only eye witness, Marilyn Redmond, was extremely unreliable and Hooper had not only not been convicted of the crime but he had not even been charged with it at the time of his alleged statements to Nellums. The fourth distinction between this case and Dutton v. Evans, supra. is that this Court, in Dutton, found little possibility that Williams' statement was founded on faulty recollection. This is obviously because of the fact that Williams' statement, as pointed out above, was in the nature of an emotional outburst arising out of his deep-seated anger and was not the kind of statement which involved recollection at all. Whereas, in this case, all of Hooper's alleged statements were founded on recollection because they all had to do with past events. Finally, in Dutton v. Evans, supra. Williams' statement was not made in circumstances giving reason to suppose that he was misrepresenting anything, again because of his anger, whereas in this case Hooper's declarations are in the very nature of driving around and bragging to an old crony.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DEFINE THAT POINT AT WHICH THE JOINT TRIAL OF CRIMINAL DEFENDANTS WITH ANTAGONISTIC DEFENSES DENIES THE CRIMINAL DEFENDANT HIS RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Robert Cruz and Edward Lonzo McCall were not co-defendants at the outset of this case. In CR-116940 Cruz was never a defendant. In CR-120721 they were co-defendants, but McCall was charged only in Count I with conspiracy. He had already been charged with the various substantive counts in CR-116940.

In CR-120721 Cruz filed a written motion to sever which was joined in by McCall. In the meantime, the government moved to consolidate both cases for trial which, of course, the defendant objected to and on September 25, 1981 the trial court granted the government's motion to join and denied the defendants' motion to sever. McCall contends that he was denied the most basic right of all by this joint trial, the right to a fair trial. As a result of the joinder. the record is absolutely chock full of evidence of other bad acts which was brought out against McCall by counsel for Cruz that would never have come in in a severed trial. The defendant was placed in a position where Cruz and the government attacked him with near equal force. The trial was so unfair that defense counsel for McCall raised the severance question 17 additional times during the trial.

The ground upon which severance was sought was that of antagonistic defenses, i.e., that McCall, in a joined trial, would have to defend himself not only against the government but against Cruz as well. Cruz made it clear, over a month before trial began, that he would be attacking McCall. His theory was that McCall and the witness, Arnie Merrill, were part of a burglary ring which broke into the Redmond home and committed murder when things went awry.

When the trial began, Cruz' lawyer was true to his word – beginning his attack on McCall right in his opening statement. Thereafter, he never let a chance go by. He attacked McCall at least 11 more times during the testimonial phase of the trial and finally landed on McCall with both feet in closing argument. Co-counsel's remarks in opening statement, remarks in closing argument, and the 11 examples of his attacks upon McCall are attached hereto and designated Appendix C. The defendant urges that a severance was mandated under these circumstances -- in a joint trial McCall could not get and did not get a fair trial.

The Arizona rule on severance is Rule 13.4(a) of the Arizona Rules of Criminal Procedure, 17 A.R.S. It is drawn from the ABA Standards relating to joinder and severance. (Approved draft 1968) The comment to the rule in the ABA Standards describes this case perfectly and illustrates why McCall was denied a fair trial by his joinder with Cruz:

> ". . . It has long been the view that defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other. Annot., 70 ALR 1171, 1184-85 (1931) What is to be avoided is the kind of trial fitting this description by one appellate court of the proceedings below: 'The trial was in many respects more of a contest between the defendants than between the people and the defendants. It produced a spectacle where the people frequently stood by and witnessed a combat in which the defendants attempted to destroy each other.'" People v. Braune, 363 Ill. 551, 557, 2 N.E.2d 839, 842 (1936)

Distilled from this quote is the principle that the defendant is entitled to severance if he has to spend a substantial portion of his time and energy at trial defending against a co-defendant.

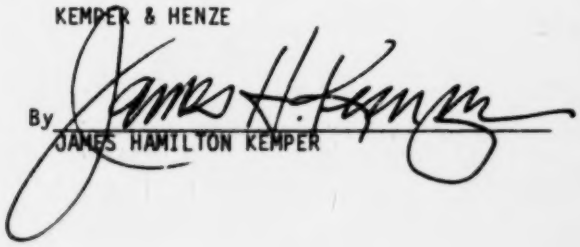
This is what happened here because Cruz based his whole defense on McCall's guilt. He suggested it in his opening statement, with every witness who might know about Merrill's burglary ring, and in closing argument. It is clear that Cruz and McCall were on a "collision course". It is plain that the trial was "a combat in which the defendants attempted to destroy each other." (Indeed, Cruz was lucky enough to have his conviction reversed because of an adverse comment brought out about him by McCall's counsel.) A man cannot get a fair trial in these circumstances and McCall did not get one. This Court should grant certiorari to right this wrong.

CONCLUSION

For the reasons stated herein, the Writ of Certiorari to the Arizona Supreme Court should be granted.

RESPECTFULLY SUBMITTED this 3rd day of April, 1984.

KEMPER & HENZE

By 
JAMES HAMILTON KEMPER

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

FILED
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CLERK SUPREME COURT

STATE OF ARIZONA,

Appellee,

vs.

EDWARD LONZO McCALL,

Appellant.

Supreme Court
No. 5482

Appeal from the Superior Court of Marciopa County

(Cause Nos. CR-116940 and CR-120721)

The Honorable Paul W. LaPrade, Judge

Affirmed

Robert K. Corbin — Phoenix
Attorney General

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GORDON, Vice Chief Justice:

On December 10, 1981, a jury found appellant guilty of two counts of first degree murder, one count of conspiracy to commit first degree murder, one count of attempted first degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first degree burglary. At a subsequent sentencing hearing, appellant was sentenced to death for each count of first degree murder, life imprisonment for the conspiracy count, twenty-one years imprisonment for the attempt count, twenty-one years imprisonment for each kidnapping count, twenty-one years for each armed robbery count, and twenty-one years imprisonment for the first degree burglary count. Timely appeal was filed from all convictions. This Court has jurisdiction under Ariz. Const. art. 6, § 5(3) and A.R.S. § 13-4031. We affirm the convictions and the sentences.

The facts in this case have been set out in some detail in our opinion in appellant's co-defendant's appeal, State v. Cruz, ____ Ariz. ____, ____ P.2d ____ (1983) [No. 5483, filed October 6, 1983]. We will set forth only those facts necessary for a full understanding of the legal issues discussed herein.

On appeal, appellant has raised eight issues:

1. Whether the denial of his repeated motions to sever

constitutes reversible error;

2. Whether the admission of certain "other bad act" evidence constitutes reversible error;

3. Whether Marilyn Redmond's identification of him at his preliminary hearing was unduly suggestive thereby tainting her in-trial identification;

4. Whether the denial of his motion to suppress physical evidence seized in a search of his home constitutes reversible error;

5. Whether the admission of certain statements by alleged co-conspirators constitutes reversible error;

6. Whether the admission of certain photographs constitutes reversible error;

7. Whether the admission of testimony concerning the terms of Arnold Merrill's plea agreement constitutes reversible error;

8. Whether A.R.S. § 13-703 is unconstitutional in that a judge rather than a jury determines sentence or in that no guidance is given as to what may be considered in mitigation.

Motion to Sever

Prior to and during trial, appellant made repeated motions to sever his trial from that of his co-defendant. All of these motions were denied. He now claims that such denial was reversible error. We disagree.

As we have made clear, a trial court must grant a motion to sever "if necessary to promote a fair determination of guilt or

innocence of any defendant, or if the court detects the presence or absence of unusual features of the crime or case that might prejudice the defendant," State v. Cruz, supra, slip opinion at 4; State v. McGill, 119 Ariz. 329, 580 P.2d 1183 (1978). Appellant claims that his defense was so antagonistic to that of his co-defendant Cruz that he was prejudiced by Cruz' defense and that the trial should have been severed. In Cruz' appeal to this Court, he made a similar argument. We held there that to require severance based on antagonistic defenses, a defendant must show that his defense and that of his co-defendant(s) were mutually exclusive. State v. Cruz, supra. Examining the trial of McCall and Cruz, we found that their "defenses were not mutually exclusive * * * [and] did not require severance." Slip opinion at 9. We have no reason to disturb that finding. The trial court was not required to sever based on the nature of the defenses.

A defendant may, however, be prejudiced by the actual conduct of a co-defendant's defense even where a severance is not mandated by the nature of the defenses. State v. Cruz, supra; United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979), cert. denied, 444 U.S. 1031, 100 S.Ct. 701, 62 L.Ed.2d 667 (1980). Appellant points to the admission of "other bad act" evidence and to his waiver of his right to testify in his own behalf as indicia of that prejudice in his case.

Evidence of other wrongs is not generally admissible to show that the defendant is a bad person or has a propensity for committing crimes. State v. Hines, 130 Ariz. 68, 633 P.2d 1384 (1981). However, such evidence may be admitted for other

purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ariz. R. Evid. 404(b). It also may be admitted to complete the story of the crime. State v. Sanchez, 130 Ariz. 295, 635 P.2d 1217 (1981); State v. Reinhold, 123 Ariz. 50, 597 P.2d 532 (1979).

The "other bad act" evidence appellant complains of falls into two broad groups. The first involves testimony concerning a plan by Bracey, Hooper, and appellant to take over the drug business in South Phoenix and, in so doing, to murder an individual known as "Big Parker." Such evidence demonstrated the relationship appellant had with Bracey and Hooper. It helped explain to the jury what appellant meant when he told Mr. Merrill that he (appellant) was "changing sides" to join Bracey and Hooper and would be living "life in the fast lane." We find such evidence properly admitted either as evidence of appellant's motive in joining Bracey and Hooper in the Redmond murder or as evidence completing the story for the jury.

The remaining "other bad act" evidence complained of involves testimony from two witnesses regarding appellant's participation in four earlier thefts. The identity of the participants in the four thefts was properly admitted in the joint trial because part of Cruz' defense strategy was to assert that the Redmond killings were the result of a "botched robbery" in which appellant and others took part. Cruz' attempt to show the similarity among these four thefts and the Redmond theft/murder was properly admitted as evidence of a common plan. State v. Mulligan, 126

Ariz. 210, 613 P.2d 1266 (1980); State v. Miller, 128 Ariz. 112, 624 P.2d 309 (App. 1980). We find that no prejudice to appellant could have resulted from the testimony regarding the Klugman or Romero thefts because there was no testimony that appellant had been involved in them in any way. There was, however, testimony regarding appellant's participation in the Spiegal and Bissett thefts. Had appellant's motion to sever been granted, Cruz' defense theories would obviously not have been before the jury and the introduction into evidence of appellant's involvement in these latter two thefts would have been error. It would not, however, have been error requiring reversal. In view of the other overwhelming evidence against appellant, it is unlikely that a jury would have been prejudiced or outraged by the two prior thefts. See State v. Jackson, 124 Ariz. 202, 603 P.2d 94 (1979). Similarly, the introduction of this evidence into the joint trial did not create prejudice requiring severance.

Appellant's second assertion of prejudice resulting from the denial of his motions to sever involves the waiver of his constitutional right to testify in his own behalf. Ariz. Const. art. 2, § 24. He argues that he was forced to forego that right because of the likely cross-examination on the "other bad act" evidence mentioned above. However, the "other bad act" evidence was properly admitted and, as appellant acknowledges, would therefore have been a proper subject for cross-examination. We find that appellant's waiver of his right to testify was not compelled but rather, as the trial court ascertained, it was a knowing and voluntary waiver made with full and complete advice

from counsel. Such waiver is effective, State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967); State v. Thornton, 26 Ariz.App. 472, 549 P.2d 252 (1976), and does not establish the prejudice necessary to mandate severance. See State v. Barry, 25 Wash.App. 751, 611 P.2d 1262 (1980).

Objection to Certain "Other Bad Act" Evidence

In addition to arguing that the "other bad act" evidence was prejudicial and therefore warranted severance, appellant asserts that certain testimony from Mr. Merrill concerning the possible takeover of the drug business in South Phoenix was irrelevant. However, as noted in the "Motion to Sever" section above, the complained-of testimony was relevant as evidence of appellant's motive in joining Bracey and Hooper in the Redmond murders or as evidence completing the story for the jury. There was no error by the trial court in admitting this testimony over relevancy objections.

Pre-Trial Identification

Appellant asserts that he was denied due process of law when the trial court permitted the surviving victim, Marilyn Redmond, to identify him at his trial. Appellant argues that Mrs. Redmond's identification of him at the preliminary hearing was the result of an unduly suggestive identification process and

that her identification of him at trial was thereby tainted.

It is fundamental that every criminal defendant has a due process right to a fair identification procedure. See, e.g., Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); State v. Dessureault, 104 Ariz. 380, 453 P.2d 951, reh'g. denied, 104 Ariz. 439, 454 P.2d 981, cert. denied, 397 U.S. 965, 90 S.Ct. 1000, 25 L.Ed.2d 257 (1970). Reliability is the linchpin in determining the fairness and admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); State v. Myers, 117 Ariz. 79, 570 P.2d 1252 (1977), cert. denied, 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978). Even where a pre-trial identification process is unduly suggestive, the resultant in-court identification is admissible if, in view of the totality of the circumstances, the in-court identification is reliable. State v. Schilleman, 125 Ariz. 294, 609 P.2d 564 (1980).

Upon arrival of the police at the scene of the shooting, Mrs. Redmond initially indicated that her assailants had been three black men. She then changed her response, indicating that there had actually been two black men and one white man. Three days after the shooting, on January 3, 1981, Mrs. Redmond was shown a six-photograph lineup. It contained a picture of appellant. Mrs. Redmond was unable to make an identification. On January 7, Mrs. Redmond informed police detectives that she had seen an artist's drawing of appellant on a television newscast, but that one of the police officers guarding her had immediately turned

the television off. The next day, Mrs. Redmond was shown a videotaped lineup of six men, including appellant. Mrs. Redmond was again unable to make an identification.

On January 14, 1981, Mrs. Redmond attended appellant's preliminary hearing. Appellant was present and sitting next to his attorney at the defense table. He was wearing handcuffs, leg manacles, and a white T-shirt with "MCSO" (Maricopa County Sheriff's Office) printed across the front. Two uniformed deputies were in the courtroom; one sat directly behind the appellant while the other sat behind the prosecution. Mrs. Redmond, during her testimony, identified appellant as the one white man among her assailants. On June 19, 1981, appellant filed a Motion to Suppress seeking to preclude Mrs. Redmond from identifying him at trial and to suppress evidence of her identification of him at the preliminary hearing. After a three-day hearing on the issue, appellant's motion was denied. Appellant now argues that this denial was error requiring reversal. We disagree. While the preliminary hearing was indeed suggestive, there are significant indicia of reliability surrounding Mrs. Redmond's identification of appellant at that preliminary hearing. As such, the prior identification was admissible and there was no error in allowing Mrs. Redmond to identify appellant during the trial.

Factors considered in this determination of reliability include:

> (1) the opportunity of the witness to view the criminal at the time of the crime,

(2) the witness' degree of attention,

(3) the accuracy of the witness' prior description of the criminal,

(4) the level of certainty demonstrated by the witness at the confrontation, and

(5) the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972).

Mrs. Redmond had three opportunities to observe appellant at the time of the crime. She first saw him in her family room where he was apparently holding a gun on her husband. The room was well-lighted; Mrs. Redmond was in the room for three to four minutes and was only a few feet away from appellant. Later, while one of the other assailants was looking for guns in a hall closet, Mrs. Redmond viewed her husband and appellant still in the family room. Her view was unobstructed and she was but five to six feet from appellant. Mrs. Redmond's third opportunity to see appellant was when he brought her husband into the master bedroom. That room was also well-lighted and Mrs. Redmond had a clear view of appellant for a minute or two. At each of these encounters, Mrs. Redmond's attention was fixed upon appellant. He was holding a weapon on her husband as part of a three-man armed robbery. She testified at the hearing on appellant's Motion to Suppress that while the second assailant was looking in the hall closet for guns, she "* * * purposely moved over and looked around the corner to see what the white man [appellant] and [her]

husband were still doing."

Appellant argues strongly that Mrs. Redmond's first description of her assailants as being three black men and her inability to identify appellant in either the photographic or videotaped lineup show a lack of accuracy that mandates suppression. However, the evidence at the hearing on appellant's Motion to Suppress gave the trial court a more complete understanding of these occurrences. When found at the scene, Mrs. Redmond was lapsing in and out of consciousness, was in considerable pain, and was barely able to speak. Phoenix Police Officer Thomas Varela testified about his initial conversation with Mrs. Redmond:

> "THE WITNESS: I asked her, she was in lots of pain and she could hardly talk and I said, 'How many?' She would say (witness makes grunting noise) 'Three.' It would come out in a muffled tone.
>
> "I would say, 'One?' 'No.' 'Two?' 'No.' 'Three?' 'Yes, three.' That is the way my conversation went with her.
>
> "THE COURT: How did the race business come out?
>
> "THE WITNESS: I asked her, I said, 'Black, White, Mexican,' and then she'd say -- I said, 'Black?' She said, 'Yes.' I said, 'All three?' She goes, 'Yes -- no, wait.' And then at that point, I said, 'Are you sure?' She said, 'No, wait. One was white.' Then she gave me a description of the guy."

Her description was quite detailed. Regarding the photographic lineup of January 3, 1981, the evidence at the hearing not only showed that the photograph of appellant was not a recent one but also indicated that Mrs. Redmond was still in the hospital's Intensive Care Unit following the gunshot wound to her head, that

she could not focus well, that she was in pain and on medication, and that she was really not cognizant of why she was looking at the photographs. Similarly, on January 8, 1981, at the showing of the videotaped lineup, Mrs. Redmond was still in the hospital, on medication, and had to be prompted to respond at all. She was being prepared for surgery, had double vision and had not yet regained the use of her left arm and leg. She testified that at the time she found it "difficult to even think." Despite her condition, she did view the tape and, though not positively identifying anyone, did indicate that two of the men in the lineup looked like "possibilities." One of these two men was appellant. As we have made clear, a witness' previous inability to identify a defendant goes to the credibility of the witness, not the admissibility of subsequent identifications. State v. Myers, supra.

Mrs. Redmond's identification came fourteen days after the crime. While we have ruled that, in at least one case, ten days after the crime was too distant to permit a reliable identification, State v. Strickland, 113 Ariz. 445, 556 P.2d 320 (1976), each case must be considered on its own facts. Examining the totality of the circumstances here, Mrs. Redmond's identification of appellant fourteen days after the crime was not so late as to be per se unreliable.

Based on the foregoing factors and Mrs. Redmond's testimony that, in making her identification at the preliminary hearing, she relied solely on her independent recollection of the night of the crime and would do so at trial, we find no error in the trial

court's refusal to suppress the identifications.

Suppression of Physical Evidence

Appellant contends that a search of his home conducted pursuant to a search warrant was unlawful and in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. He asserts that the affidavit submitted in support of the search warrant did not provide the magistrate with sufficient probable cause upon which to issue the warrant. Therefore, he claims that the trial court's denial of his Motion to Suppress and the subsequent admission of certain items into evidence was reversible error. We find no such error.[1] No search warrant shall be issued except upon probable cause. U.S. Const. Amend. IV; A.R.S. § 13-3913. Probable cause for the issuance of a search warrant exists where the facts and circumstances presented to the magistrate are based on personal knowledge or trustworthy information sufficient to warrant a person of reasonable caution to believe that seizable items are located on the premises to be searched. State v. Adamson, ____ Ariz. ____, 665 P.2d 972, cert. denied, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1983); State v. Maddasion, 24

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[1] We find this search warrant to have been issued upon probable cause sufficient under Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and under Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317, ____ L.Ed.2d ____ (1983). As such, we need not determine the retroactivity of Gates.

Ariz.App. 492, 539 P.3d 966 (1975), aff'd., 130 Ariz. 306, 636 P.2d 84 (1981).

The affidavit appellant complains of is an eleven-page statement by a Phoenix police officer containing information about the Redmond burglary/murder and an earlier burglary. It includes considerable information from a confidential informant as well as information from the surviving victim and from other named citizens. Many details included in the informant's statements are verified by the named citizens, by the surviving victim, and by independent police investigation. Such verification lends increased reliability to the statements of the informant. Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Appellant argues that the affidavit lacked any facts from which the magistrate could conclude that his (appellant's) car or home contained any of the items sought. We find, however, that the magistrate did have many detailed facts before him. The affidavit included, among other things, the victim's physical description of the assailants, a description of appellant, a description of an unfamiliar car seen at the Redmond residence near the time of the killings, a description of a car in which appellant and two companions were riding the evening of the killings, a description of a car owned by appellant, a description of the type of tape purchased by a white man and two black men the day of the Redmond killings, a description of the type of tape appellant and his two black companions had with them on the evening of the killings, a description of the type of tape

used to bind the victims, a statement that the type of tape was known only to police investigators and not to the press, a description of a brown pouch-type briefcase carried by the assailants, a description of a brown pouch-type briefcase owned by appellant, the fact that the informant had physically produced a brown pouch-type briefcase containing a .410 gauge sawed-off shotgun and two street maps, the fact that one of those street maps had a pen mark at the approximate location of the Redmond residence, and the fact that the informant told the affiant that appellant had admitted committing the killings. This Court has repeatedly held that affidavits for search warrants should be interpreted in a common-sense and realistic fashion. Adamson, supra; State v. Watson, 113 Ariz. 218, 550 P.2d 89 (1976).[2] From the facts detailed in the affidavit, it was not an unreasonable conclusion that items sought, which included the clothing described by the victims, a receipt from the purchase of the tape

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[2] This view was recently ratified by the United States Supreme Court in Gates, supra, at ____, 103 S.Ct. at 2332, ____ L.Ed. 2d at ____:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for * * * conclud[ing]' that probable cause existed."

We conclude that the magistrate in this matter had such a substantial basis.

used to bind the victims, and dog hair from the Redmond's dog, would indeed be found in appellant's car or home. See United States v. Lucarz, 430 F.2d 1051 (9th Cir. 1970); State v. Torrez, 112 Ariz. 525, 544 P.2d 207 (1975), cert. denied, 425 U.S. 916, 96 S.Ct. 1517, 47 L.Ed.2d 767 (1976). The affidavit further indicated that appellant had told the informant that the Redmond murder, though actually a contract killing, had been designed to look like a robbery. Thus, it was not unreasonable for the magistrate to conclude that the jewelry and other items taken would not have been quickly disposed of as might be the case in a "normal" robbery or burglary but would still be at appellant's home. As we find no clear and manifest error, we uphold the trial court's denial of appellant's Motion to Suppress. See State v. Walker, 119 Ariz. 121, 579 P.2d 1091 (1978).

Co-conspirator's Admissions

Appellant argues that certain statements made by Bracey and Hooper in January, 1981 were improperly admitted because they were hearsay. The trial court admitted the statements pursuant to Ariz. R. Evid. 801(d)(2)(E). Appellant asserts that this was error. Appellant's co-defendant Cruz made an identical argument in his appeal to this Court. After full analysis, we held there that the evidence was properly admitted under Rule 801(d)(2)(E). State v. Cruz, supra, slip opinion at 13-16. We find no reason to alter that holding nor to repeat the analysis here. The statements were properly admitted.

Gruesome Photographs

Appellant asserts that the admission of seven photographs, to which he objected at trial, was error because their prejudicial effect outweighed their probative value. Photographs that tend to arouse the emotions of the jurors may be admitted if they are relevant and if their probative value outweighs the danger of unfair prejudice attendant to their admission. State v. Grilz, ____ Ariz. ____, 666 P.2d 1059 (1983); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983); State v. Gerlaugh, 134 Ariz. 164, 654 P.2d 800 (1982). The decision to admit such photographs is within the sound discretion of the trial court and will be disturbed on appeal only if that discretion is abused. State v. Grilz, supra; State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Applying this test to the instant case we find no reversible error.[3] The first three photographs show Mrs. Phelps' bullet wounds. One shows the entry wound in her left cheek, another shows the corresponding exit wound in her right cheek, the third shows the entry wound in the back of her head. These photographs were taken during the autopsy after the body had been cleaned. Still, they do show a significant amount of blood and we agree with appellant that they are somewhat inflammatory. The fourth photograph shows Pat Redmond's wounds. It shows the compound

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[3] We express no opinion as to the admissibility of photographs not objected to.

entry wound on the side of his head as well as his slit throat. This photograph was also taken during the autopsy and is inflammatory. We cannot, however, say the trial court abused its discretion in determining that these four photographs were relevant and that their probative value outweighed any danger of unfair prejudice they may have caused. Appellant and Cruz were charged, among other things, with first degree premeditated murder. Consequently, the state was required to prove that the killings were premeditated and intentional. The similar placement and number of gunshot wounds, illustrated in the photographs, tend to indicate a careful, deliberate act done with the intent to kill. Therefore, the photographs may have helped the jury determine whether the killings were premeditated and intentional. State v. Hallman, ____ Ariz. ____, 668 P.2d 874 (1983); State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). Furthermore, the state's theory of the case was that the killings were planned, gangland-style executions. Again, the placement and number of gunshot wounds as well as the cutting of Pat Redmond's throat tend to support this theory. Consequently, the photographs were relevant. State v. Grilz, supra; State v. Caldwell, 117 Ariz. 464, 573 P.2d 864 (1977).

The fifth and sixth photographs show the faces of Pat Redmond and Mrs. Phelps, respectively. They, too, were taken during the autopsies. These photos, by themselves, are not particularly inflammatory. They are, however, cumulative. Neither photograph shows anything of significance that the previously discussed

photographs do not show better. As they are merely cumulative and not inflammatory, their admission into evidence, if error at all, was harmless.

The seventh photograph shows the body of Pat Redmond lying on the bedroom floor of his home. His hands are taped behind his back, he is gagged, his head and shirt are soaked with blood, and the cut on his neck is clearly visible. This photograph is inflammatory. However, we do not find that the trial court abused its discretion in admitting it. Though other possibly less inflammatory photographs show Pat Redmond's general position in the bedroom, this photograph was the only one available that showed his entire body. Other photographs showed tied hands, a turned-out pocket, and a gagged face, but, if shown only those, the jury would have had to be told that the hands, the pocket, and the face were those of Pat Redmond. Each member of the jury would have then had to piece together in his own mind where the body was in the room and what it looked like when found. This photograph alleviated the need for such speculation and, as such, was properly admitted.

Appellant further argues that, because he and his co-defendant offered to stipulate to the identity of the two murder victims and the time, mode, manner, and cause of their deaths, the photographs of the victims were unnecessary and should have been excluded. This offer of stipulation does not render the photographs irrelevant. State v. Gerlaugh, supra. Again, the state had charged appellant with first degree premeditated murder. These photographs support the theory that

the murders were well-planned and deliberate. The intent of the killers was an element the state had to prove, but was never part of the proposed stipulation. Further, we cannot compel the state "to try its case in a sterile setting." State v. Chapple, 135 Ariz. at 289-90, 660 P.2d at 1217. We find no error in the admission of the photographs.

Plea Agreement Testimony

Appellant argues that it was error to allow Arnold Merrill to testify that one of the terms of his plea agreement was that he testify truthfully whenever called upon by a state or federal law enforcement agency. Appellant asserts two bases for his argument. The first is that such testimony is irrelevant as it has no tendency to make any fact in issue more or less probable. See Ariz. R. Evid. 401. However, as we have made clear, any evidence that substantiates the credibility of a prosecution witness on the question of guilt is material and relevant and may be properly admitted. State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981); State v. Mosley, 119 Ariz. 393, 581 P.2d 238 (1978). Because Mr. Merrill's credibility and his motives for testifying were proper subjects for jury determination, we find no abuse of discretion by the trial court in admitting this testimony over relevancy objections.

Appellant's second contention is that such testimony constitutes vouching by the prosecution. Improper vouching takes two forms: the prosecution may place the prestige of the

government behind the witness or may indicate that information not presented to the jury supports the witness' testimony. United States v. Roberts, 618 F.2d 530 (9th Cir. 1980), cert. denied, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981) citing Lawn v. United States, 355 U.S. 339, 359-60 n. 15, 78 S.Ct. 311, 323 n. 15, 2 L.Ed.2d 321, 335 n. 15 (1958). Here, as in Roberts, vouching of the second type is charged. In Roberts, a witness' plea agreement, containing a provision that he testify truthfully, was admitted into evidence. In his closing argument, the prosecutor mentioned the plea agreement, then pointed out a detective sitting in the courtroom. That detective, the prosecutor told the jury, "had a mission to serve and that mission was to sit and listen to the testimony of [the immunized witness]." Id. at 533. The Ninth Circuit Court of Appeals held that the prosecutor committed reversible error by using the detective as an unsworn witness to the immunized witness' truthfulness and credibility.

In the instant case, the prosecutor's actions were not so egregious. Appellant's charge of vouching is based solely on the following interaction:

> "Q. [by the prosecutor]: As a result of your guilty plea, did you make any promises?
>
> "A. [by Mr. Merrill]: Yes, sir.
>
> * * *
>
> "Q. What did you promise to do?
>
> "A. To testify truthfully whenever called upon before any State or Federal law enforcement agency."

We find nothing improper in this questioning. The prosecutor did not express any personal opinion regarding the truth of Mr. Merrill's testimony nor did he refer in his questioning or in his closing argument to any information outside the knowledge of the jury. Appellant and his co-defendant had and used the opportunity of cross-examining Mr. Merrill to attack his credibility and character. In addition, the trial court's response to the objection at trial made clear that, merely because Mr. Merrill had promised to tell the truth, there was no guarantee that he had. The jury instructions also reiterated that the jury should take into account any motive or prejudice that any witness might have. Despite this, appellant argues that the "inevitable implication" from knowing that certain charges could be reinstated if Mr. Merrill lied was that the prosecutor, from information not presented to the jury, knew the truth and became, in effect, an unsworn witness to Mr. Merrill's credibility. We disagree. The above-quoted testimony does not amount to improper vouching but simply demonstrates that the witness had no motive to testify falsely. See United States v. Ricco, 549 F.2d 264 (2d Cir.), cert. denied, 431 U.S. 905, 97 S.Ct. 1697, 52 L.Ed.2d 389 (1977) and cases cited therein. Had this precise testimony come on redirect examination after the expected strenuous defense attack on Mr. Merrill's credibility and character, the rehabilitative questioning would have obviously been allowed. United States v. Armedo-Sarmiento, 545 F.2d 785 (2d Cir. 1976), cert. denied, 430 U.S. 917, 97 S.Ct. 1330, 51 L.Ed.2d 595 (1977). As the prosecution would not be

precluded from responding to a defense attack on a witness' credibility, we will not prohibit it from using such questions on direct examination. State v. Fleming, 117 Ariz. 122, 571 P.2d 268 (1977); State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (App. 1979).

Constitutionality of A.R.S. § 13-703

Appellant raises two challenges to the constitutionality of A.R.S.§ 13-703. He first contends that the statute, which provides for judge rather than jury determination of the sentence upon conviction of first degree murder, is unconstitutional because it denies him the right to a trial by jury. Though a trial by jury is indeed mandated by the Sixth and Fourteenth Amendments to the United States Constitution, it is clear that sentencing by jury is not constitutionally required. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Blazak, 131 Ariz. 598, 643 P.2d 694 (1982); State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981); State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).

Appellant further argues that A.R.S. § 13-703 is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution because it gives no guidance as to what constitutes a mitigating circumstance or as to how to balance aggravating factors against mitigating factors. We have

previously considered these arguments and consistently rejected them. See, e.g., State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981); State v. Mata, 125 Ariz. 233, 609 P.2d 48, cert. denied, 449 U.S. 938, 101 S.Ct. 338, 66 L.Ed.2d 161 (1980).

Sentencing

Although appellant did not contest the imposition of the death penalty, we have independently reviewed the record to determine if the trial court correctly applied the aggravating and mitigating circumstances and correctly imposed the death penalty. State v. Adamson, supra; State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983). The sentencing court found three statutory aggravating circumstances: A.R.S. § 13-703(F)(3) (that appellant knowingly created a grave risk of death to another person in addition to the two victims of the offense); A.R.S. § 13-703(F)(5) (that appellant committed the offense as consideration for the receipt, or in expectation of the receipt, of something of pecuniary value); and A.R.S. § 13-703(F)(6) (that appellant committed the offense in an especially heinous, cruel or depraved manner).

The sentencing judge based his finding of the evidence of an aggravating circumstance under A.R.S. § 13-703(F)(3) on the fact that Marilyn Redmond was lying on the bed bound and gagged at the time of the two murders. In the special verdict issued pursuant to A.R.S. § 13-703(D), the sentencing judge concluded that Mrs.

Redmond was, therefore, "clearly in the 'zone of danger' and was in fact shot in the head but miraculously survived." We cannot take issue with this statement of the facts, but we disagree with the sentencing judge's conclusion that these facts constitute the aggravating circumstance envisioned by A.R.S. § 13-703(F)(3).

A.R.S. § 13-703(F)(3) provides that the sentencing court must consider it an aggravating circumstance if "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense." In each of the Arizona cases where the finding of this aggravating circumstance has been affirmed, the murderous act itself put other people in a zone of danger. See State v. McMurtrey, ____ Ariz. ____, 664 P.2d 637 (1983) (defendant fired several shots in a crowded bar); State v. Ortiz, supra (defendant set fire to a house to dispose of victim's body knowing that three young children were inside); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977) (defendant fired several shots in a crowded college gymnasium); State v. Blazak, supra (defendant fired several shots in a crowded bar). Cf. State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) (defendant pointed a gun at a third party merely to quiet her; subsequent murder of victim by other means did not subject third party to danger); State v. (Raymond) Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, ____ U.S. ____, 103 S.Ct. 180, ____ L.Ed.2d ____ (1982) and State v. (Ricky) Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, ____ U.S. ____, 103 S.Ct. 180, ____ L.Ed.2d ____ (1982) (though each of three victims' bodies were close enough to the other two

that the shooting of any one of the three created a grave risk of danger to the other two, the indication that each victim was intentionally murdered foreclosed application of A.R.S. § 13-454(E)(3) (now A.R.S. § 13-703(F)(3)) to the sentencing); State v. Clark, supra (third party in another room at time defendant shot victim was not within the zone of danger). We find the instant case to be most analogous to the Tison cases. As was the case in Tison, here Pat Redmond, Marilyn Redmond, and Helen Phelps were on the bed close enough to each other that the shooting at any one of them did place the other two in grave risk of danger. However, the evidence at appellant's trial indicated that the killers intended to murder all three individuals. The shooting in the bedroom was not random or indiscriminate; rather, it was purposeful and intentional. That Marilyn Redmond miraculously survived does not alter this. We conclude that A.R.S. § 13-703(F)(3) has no application to this case.[4]

Evidence was admitted at appellant's trial which supports a finding of an aggravated circumstance under A.R.S. § 13-703(F)(5). Witness Arnold Merrill testified that appellant told him, Merrill, of his, appellant's, participation in the killings and expectation of receiving $10,000 in payment therefor. There is no doubt that A.R.S. § 13-703 (F)(5) applies to the "hired gun" situation. State v. Adamson, supra; State v. Gretzler, supra. In such a situation, a defendant clearly commits "the

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[4] The elimination of this one aggravating factor does not mandate a remand to the trial court for resentencing. Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418, ____ L.Ed.2d ____ (1983).

offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." This aggravating circumstance was properly found.

The final aggravating circumstance found by the sentencing court was that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." A.R.S. § 13-703(F)(6). This Court has defined cruelty as involving the infliction of pain on a victim. State v. Gretzler, supra; State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Such pain can be either physical pain or mental distress. State v. McDaniel, ____ Ariz. ____, 665 P.2d 70 (1983); State v. Gretzler, supra. The defendant must intend that the victim suffer or reasonably foresee that there is a substantial likelihood that the victim will suffer as a consequence of the defendant's acts. State v. Adamson, supra. Applying this standard to the facts at hand, we find that the murders were committed in a cruel manner. The Redmonds and Mrs. Phelps were herded about the Redmond home at gunpoint by three men. After giving up their valuables, they were forced to lie down on a bed, had their hands taped behind their backs, and were gagged with socks. They knew that their captors were armed. It may be inferred that they were uncertain as to their ultimate fate. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980). Except for the first victim, each of them had to endure the "unimaginable terror" of having their loved ones shot to death within their hearing and then having to wait for their own turn to come. State v. Gretzler, 135 Ariz. at 53, 659

P.2d at 12. Such mental distress clearly constitutes cruelty. State v. Gretzler, supra; State v. Steelman, supra. In addition, expert medical testimony was given that Mrs. Phelps did not die from the first gunshot wound to her head, that she did not lose consciousness as a result thereof, and that she most certainly suffered pain from that wound. The infliction of such physical pain also clearly constitutes cruelty.

We need not, however, rest our affirmation of the sentencing judge's finding of this aggravating factor on the notion of cruelty alone. There is also evidence that the murders were committed in a heinous or depraved manner. In contrast to the emphasis upon the feelings and sufferings of the victims in the case of cruelty, the A.R.S. § 13-703(F)(6) concepts of "heinous" and "depraved" involve the killer's vile state of mind at the time of the murder. State v. Gretzler, supra. Several sorts of actions on the part of a killer have led to a finding of depravity or heinousness. One such action is the infliction of gratuitous violence on or the needless mutilation of the victim. See, e.g., State v. Jeffers, supra (defendant beat dead victim about the face and buried body in a shallow grave); State v. Woratzeck, supra (defendant strangled the victim, stabbed her three times in the chest, and struck her twice on the head, where any one of the attacks was potentially fatal); State v. Smith, 131 Ariz. 29, 638 P.2d 696 (1982) (defendant murdered two girls by asphyxiation but also mutilated their breasts and their genital areas); State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981) (after strangling his victim, defendant carved the word

"Bonzai" into the victim's back); State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980) (defendant repeatedly shot and kicked his victims after they were unconscious or dead). In the instant case, Pat Redmond was not only shot twice through the head but also had his throat cut open. Expert medical testimony established that the slashing came just at the time of Redmond's death or shortly thereafter. In addition, there was also testimony that this mutilation was designed to be a "message" to warn other people. A second consideration that has led to a finding of depravity or heinousness is the senselessness of the crime or the helplessness of the victim. See, e.g., State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22 (1983) (helplessness of victim shown by her advanced age and limited mental capabilities); State v. Ortiz, supra (indiscriminate attacks on three young children following the murder of their mother); State v. (Ricky) Tison, supra (helplessness shown by very young age of one victim and senselessness of murders demonstrated by the inability of the victims to escape). The sentencing judge found that the murder of Helen Phelps was particularly senseless. We agree. She was an elderly houseguest of the Redmonds with no possible interest in their business affairs. Her murder in no way furthered the plan of the killers. Having fully reviewed the record, we agree with the sentencing judge that the evidence supported the finding of an aggravating circumstance under A.R.S. § 13-703(F)(6).

The sentencing judge found no statutory mitigating circumstances under A.R.S. § 13-703(G). We have reviewed the

record and concur. As a non-statutory mitigating circumstance, appellant urged the sentencing court to consider the fact that the testimony used to establish some of the aggravating circumstances was that of Arnold Merrill and that parts of his testimony had been contradicted by other witnesses. The sentencing court found no such contradictions and therefore found no mitigating circumstance as urged by appellant. We agree with the sentencing court that, whatever contradictions existed to Mr. Merrill's testimony, they were not of such a magnitude to warrant exclusion of that testimony from consideration in sentencing. When a defendant is being sentenced for first degree murder, the sentencing court must consider, in addition to the mitigating circumstances of A.R.S. § 13-703(G), any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether a sentence less than death might be appropriate. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); State v. McDaniel, supra. Thus, the quality of the evidence at appellant's trial was a proper consideration for the sentencing court and for this Court on review. We find, however, that this mitigation evidence is not sufficiently substantial to outweigh the existing aggravating circumstances. A.R.S. § 13-703(E). The death sentence is appropriate in the instant case.

In addition to independently reviewing the propriety of the sentence in each capital case, this Court also examines prior cases to assure that the death penalty is not disproportionately applied. We consider not only prior cases where the death

penalty was imposed upon a finding of the same aggravating circumstances but also prior cases where the death penalty was lessened to a sentence of life imprisonment. Here, we have examined cases in which the defendant received the death penalty on one or both of the aggravating circumstances found in appellant's case. See, e.g., State v. Adamson, supra (despite existence of mitigating factors, death penalty affirmed upon finding that the killing was done for pecuniary gain and in a cruel manner); State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983) (despite young age of defendant, death penalty affirmed upon finding that the killing was done in a cruel manner); State v. Woratzeck, supra (no mitigating circumstances shown; death penalty affirmed upon finding that the killing was done for pecuniary gain and in a heinous and depraved manner); State v. (Raymond) Tison, supra (despite young age and minimal prior criminal activity of defendant, death penalty affirmed upon finding that the killing was done for pecuniary gain and in a cruel, heinous or depraved manner); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (despite below average intelligence and lack of prior criminal record of defendant, death penalty affirmed upon finding that the killing was done in a heinous and depraved manner); State v. Clark, supra (despite defendant's young age, emotional problems, poor childhood home life, and lack of adult criminal record, death affirmed upon finding that the killing was done for pecuniary gain and in a depraved manner); State v. Ceja, supra (no mitigating circumstances shown; death penalty affirmed upon finding that the killing was done in a heinous and depraved

manner). We have also examined cases in which the death penalty was reduced to life imprisonment. See, e.g., State v. McDaniel, supra (finding of lack of intent to kill outweighed finding that the killing was done in a cruel manner); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) (findings of defendant's diminished capacity to appreciate the wrongfulness of his conduct, lack of other adult convictions, and no tendency toward violent crime outweighed finding that the killing was done for pecuniary gain); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981) (young age of defendant, the findings that defendant had been a model prisoner and was furthering his education in prison, and the fact that the killing had occurred during a shootout in which the victim fired first outweighed finding of prior conviction punishable by life imprisonment and involving the use or threat of force); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (finding of defendant's diminished capacity to appreciate wrongfulness of his conduct outweighed finding of prior conviction punishable by life imprisonment). We find that imposition of the death penalty in this case is not disproportionate to the imposition of the death penalty in prior cases in this state. We believe the imposition of the death penalty is justified.

Pursuant to A.R.S. § 13-4035, we have examined the entire

record for fundamental error and have found none. The judgments of conviction and the sentences are affirmed.

FRANK X. GORDON, JR.
Vice Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN
Chief Justice

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

STANLEY G. FELDMAN
Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

FILED
FEB 14 1984
S. ALAN COOK
CLERK SUPREME COURT
BY

STATE OF ARIZONA,

Appellee,

vs.

EDWARD LONZO McCALL,

Appellant.

Supreme Court
No. 5482

SUPPLEMENTAL
OPINION

Appeal from the Superior Court of Maricopa County

(Cause Nos. CR-116940 and CR-120721)

The Honorable Paul W. LaPrade, Judge

Motion for Reconsideration Denied

Judgments of Conviction and Sentences Affirmed

Robert K. Corbin — Phoenix
Attorney General

William J. Schafer III — Phoenix
Chief Counsel
Criminal Division

Gerald R. Grant — Phoenix
Assistant Attorney General

Attorneys for Appellee

Kemper & Henze — Phoenix
By: James H. Kemper

Attorneys for Appellant

GORDON, Vice Chief Justice:

The matter is before us on a motion for reconsideration. Appellant has raised two arguments that pertain to the admission into evidence of certain testimony by Morris Nellum. See "Co-conspirator's Admissions" section, supra at ____ [No. 5482, filed November 9, 1983, slip op. at 16]. He argues, first, that Nellum's statements were not made in furtherance of the alleged conspiracy and, second, that he was denied his right of confrontation guaranteed by the sixth and fourteenth amendments.

Appellant's claim that the complained-of statements were not made "in furtherance of the conspiracy" as required for admission under Ariz. R. Evid. 801(d)(2)(E) is untimely. Ariz. R. Crim. P. 31.13(c)(1)(iv) provides that the opening brief in a criminal appeal should include "[a] concise argument containing the contentions of the party, the reasons therefor, and necessary supporting citations." Failure to argue a claim constitutes abandonment, State v. Smith, 125 Ariz. 412, 610 P.2d 46 (1980); State v. Blodgette, 121 Ariz. 392, 590 P.2d 931 (1979), and waiver thereof. Appellant's opening brief contains argument that the statements were "rank hearsay" as well as arguments that "the conspiracy [had] ended at the moment [Pat Redmond] died" and, thus, was not ongoing at the time the statements were made. While the brief clearly raised the issue of whether the statements were made during or in the course of the conspiracy, it did not raise the issue of whether the statements promoted the goals or were made in the furtherance of the conspiracy. The

claim having been waived, it may not be asserted in a motion to reconsider.

Appellant's confrontation clause argument was made in his opening brief in a single, conclusory statement:

> "The admission of Hooper's statements to Nellum in evidence against McCall also denied McCall his right under the Sixth and Fourteenth Amendments to the United States Constitution to confront Hooper who did not testify at the trial."

Initially, we note that this conclusory statement meets neither the letter nor the spirit of Ariz. R. Crim. P. 31.13(c)(1)(iv). However, because the sixth amendment right to confrontation is fundamental, Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), we will address appellant's claim.

This Court has recently set forth a two-pronged analysis to be used in evaluating confrontation clause claims, State v. Martin, ____ Ariz. ____, ____ P.2d ____ (1984) [No. 5890, filed January 31, 1984]. The first prong of the analysis is unavailability of the declarant. While acknowledging that a demonstration of unavailability should be the general rule, in Martin, we stated that "[i]f the analysis shows [that] the utility of confrontation would be insignificant, the statement may be admitted even without a showing of unavailability." Id. at ____, ____ P.2d at ____ [slip op. at 26]. We note that, at the time of appellant's trial, Hooper (the declarant) had been arrested and was himself awaiting trial for first degree murder. The state did not attempt to produce Hooper at appellant's trial

nor was there any record made by the state concerning the likelihood of Hooper's using his fifth amendment privilege if he was called. Thus, we cannot determine if Hooper was truly legally unavailable. However, we also note that appellant made no record of any request that Hooper be produced for direct confrontation. Appellant must have considered, and thereby conceded, that the utility of confrontation was insignificant.

The second prong of this analysis is the reliability of the statement. In Martin, we enumerated several factors by which a statement's reliability should be tested. They include:

> (1) whether the declaration contained assertions of past fact;
>
> (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime;
>
> (3) whether it was possible that the declarant was relying upon faulty recollection;
>
> (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime; and
>
> (5) whether the declaration was "crucial" to the state or "devastating" to the defense.

Id. at ____, ____ P.2d at ____ [slip op. at 24]. Each of these elements need not be present in order to satisfy the

confrontation clause. Id. at ____, ____ P.2d at ____ [slip. op. at 24].

Nellum was Hooper's chauffeur in Chicago and was allowed to testify at appellant's trial about Hooper's activities during the months before and after the Redmond murders. He was also allowed to testify about statements made by Hooper. These statements included admissions by Hooper that he had been in Arizona on New Year's Eve, 1980, that while there he and others had killed three people, and that certain money he obtained was payment for those killings. Nellum was also allowed to testify as follows:

> "Q. [by the prosecutor]: Mr. Nellum, how many people did Mr. Hooper indicate to you were involved [in the killings] besides himself and Mr. Bracey?
>
> "A. Two other people.
>
> "Q. What did he say about these two other people, if you recall?
>
> "A. He just said that one guy was an ex-policeman, that is all."

Having evaluated Hooper's statements, we find several indicia of reliability. It is clear that the declarant, Hooper, had personal knowledge of the identity and the roles of each of the participants in the murders of Pat Redmond and Helen Phelps. There is nothing to indicate that Hooper's memory was in any way faulty; he was speaking of recent and still ongoing events. Also, the circumstances do not suggest any reason for Hooper to misrepresent the degree of involvement of appellant or any other of his coconspirators. His statements were clearly against his

penal interest and he made no attempt to downplay his own involvement by enlarging the involvement of others. He merely related information about his co-conspirators. Finally, we do not find his statements particularly critical to the state or particularly devastating to the defense. Appellant was not mentioned by name; he was not directly implicated in any wrongdoing. While appellant may have formerly been a police officer, we are not cited to any reference which indicates that the jury was aware of that. Also, the testimony concerning Hooper's activities during the conspiracy, while adding credence to the state's conspiracy theory, was not crucial to the state's proof that appellant was involved in it. We find that admission of Hooper's statements via Nellum's testimony did not violate appellant's right of confrontation.

These matters having now been considered, the motion for reconsideration is denied. The judgments of conviction and the sentences are affirmed.

FRANK X. GORDON, JR.
Vice Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN
Chief Justice

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

STANLEY G. FELDMAN
Justice

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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

EDWARD LONZO McCALL

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

83-6519

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Petitioner, EDWARD LONZO McCALL, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of the State of Arizona without pre-payment of costs and to proceed in forma pauperis. The Petitioner was represented by the law firm of Kemper & Henze, of which undersigned is a member, in the Superior Court for Maricopa County and on appeal to the Supreme Court of the State of Arizona. This representation was under a court appointment and Mr. McCall has always proceeded as an indigent in the State of Arizona.

RESPECTFULLY SUBMITTED this 3 day of April, 1984.

KEMPER & HENZE

By James Hamilton Kemper
JAMES HAMILTON KEMPER

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

I, EDWARD LONZO McCALL, being first duly sworn, upon my oath depose and state that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner at the Arizona State Prison, death row.

2. That within the last twelve months I have not received any income from any business, profession, or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking nor savings account and the only cash with which I am possessed is that which is within my prison account, which is of a minimal amount.

4. That I own an encumbered community interest in a parcel of real estate, but no other real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

5. That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Edward L. McCall
EDWARD L. McCALL

SUBSCRIBED AND SWORN to before me this 29 day of March, 1984.

Robert Flanagan
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Aug. 11, 1986

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, JAMES HAMILTON KEMPER, having first been duly sworn, state under oath that I am appointed counsel for the Petitioner in this case; that in support of this motion to proceed without being required to pre-pay fees, costs, or to give security therefor, I state that Petitioner was allowed to proceed in forma pauperis in both the Superior Court and the Supreme Court of the State of Arizona. The Petitioner is currently unemployed and has been incarcerated by the State of Arizona since 1982 on death row in the Arizona State Prison at Florence, Arizona.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

James Hamilton Kemper
JAMES HAMILTON KEMPER

SUBSCRIBED and SWORN to before me this 2nd day of April, 1984.

Rhonda L. Russo
NOTARY PUBLIC

My Commission Expires:

My Commission Expires: Feb. 1, 1987